No. 13,042

United States Court of Appeals
For the Ninth Circuit

DOUGLAS HEAY,
Appellant,

vs.

DEAN PHILLIPS, CHARLES GRAY and JAMES KELLY,
Appellees.

BRIEF FOR APPELLANT.

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Subject Index

Table of Authorities Cited

Cases

Statutes

Texts

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STATEMENT OF PLEADINGS AND ABSTRACT OF CASE.

On the 24th day of January, 1951, appellees filed a complaint (T. R. 3-4) in the District Court for the District of Alaska, 4th Division, alleging essentially that appellant, after destroying appellees' aircraft, had promised to pay to appellees the sum of $3,000.00 for said aircraft. Since there was no consideration alleged to support the pleaded promise, appellees' motion to dismiss (T. R. 21) this complaint was granted (T. R. 22). On the 19th day of March, 1951, appellees filed an amended complaint (T. R. 6) which corrected their first defective pleading by alleging a prior promise on the part of appellant, as bailee, and in consideration of the bailment of, "to pay the reasonable value of same (the aircraft) if destroyed

while in defendant's possession". To this amended complaint, appellant filed an answer which operated generally to deny the existence of any contract modifying the usual obligations attached by operation of law to a contract of bailment (T. R. 5). With the issues thus drawn on the question of whether or not a contractual liability existed obligating appellant to pay the sum of $3,000.00 for the destroyed aircraft, appellees at the trial of said cause (as regularly set on the 7th of May, 1951, and prior to the introduction of any evidence) were permitted by the court to file a second amended complaint (T. R. 9, 50) alleging as an alternative cause of action the negligent destruction by appellant of appellees' aircraft. Although appellant promptly moved for a continuance, the cause was reset for the following day over appellant's objection that one day's extension was inadequate (T. R. 50, 51).

On the next day appellant moved for a continuance of three days based on the appellees' amendment and his need for preparation to meet the new issue thus tendered (T. R. 52-55). This motion was denied and counsel were directed to proceed with the trial (T. R. 56).

Judgment was rendered on the issue of negligence alone. (Findings of Fact and Conclusions of Law, T. R. 33-34).

The denial of appellant's motion for continuance is claimed as error. Appellant filed a motion for new trial in the court below in which one of the grounds stated was the ruling complained of (T. R. 40, 41).

The question was saved for the consideration of this court by assigning the trial court rulings on appellant's motion for continuance and motion for new trial as error in the statement of points filed herein (T. R. 338, 339).

The jurisdiction of the District Court is based upon Title 48, U. S. Code, section 101 (48 U.S.C.A., section 101). This court has jurisdiction to entertain this appeal by virtue of the authority conferred upon it by Title 28, U. S. Code, sections 41 and 1291.

SPECIFICATION OF ERROR.

The trial court erred in denying appellant's motion for a three-day continuance (T. R. 52-56) and in overruling appellant's motion for new trial (T. R. 40, 43).

The trial court's denial of appellant's motion for continuance and motion for new trial brings before this court for appellate review the question of whether or not the trial court abused its discretion in denying appellant's motion for continuance and whether or not appellant was thereby prejudiced.

ARGUMENT.

INTRODUCTION.

As a general rule, any party confronted by a substantial amendment of his adversary's pleading is entitled to a continuance where such amended plead-

ing operates to his surprise and to his prejudice. The refusal or grant of such continuance rests in the sound judicial discretion of the trial court. Such discretion is, of course, subject to appellate review. A statement of this rule is set out in 17 *C.J.S.*, section 71, pages 244 to 246 as follows:

> "It is generally held that, while any substantial amendment of the pleadings which operates as a surprise to the opposite party, who has not been guilty of any lack of diligence, usually entitles him to a continuance, the mere fact that a pleading is amended does not of itself entitle the opposite party to a continuance as a matter of course.
>
> The granting of a continuance on the ground of surprise caused by the amendment of pleadings is largely within the discretion of the court, and this discretion will not be disturbed unless it appears that it has been abused.
>
> *Prejudice.* One of the important considerations in the matter of granting or refusing a continuance is whether applicant would be prejudiced by a refusal. Thus it must appear that applicant cannot safely proceed with the trial, or is less prepared to do so in consequence of the amendment as allowed than if the amendment had been denied, as where different or additional evidence, otherwise unnecessary, is required to meet the amendment."

An excellent statement of the meaning of judicial discretion with reference to the grant or denial of continuances is contained in *Charlesworth v. American Express Co.* (1918), 117 Me. 219, 103 A. 358, 359 as follows:

"The granting or denying of a motion for continuance is of course recognized as a matter of judicial discretion, but the term 'judicial discretion' does not mean the arbitrary will and pleasure of the judge who exercises it. It must be a sound discretion exercised according to the well established rules of practice and procedure, a discretion guided by the law so as to work out substantial equity and justice. It is magisterial, not personal discretion. The chief test as to what is or is not proper exercise of judicial discretion is whether in a given case it is in furtherance of justice. If it serves to delay or defeat justice it may well be deemed an abuse of discretion. Incidents attending the progress of the trial are necessarily addressed to the discretion of the court. 'That discretion is not to be exercised arbitrarily, but to be guided and controlled, in view of all the facts, by the law and the justice of the case, subject only to such rules of public policy as have been wisely established for the common good. York and Cumberland R. R. Co. v. Clark 45 Me. 151, 154.'

"It has been held in many states that if an amendment in pleading is made as a matter of substance, and the adverse party is surprised, he is entitled to a continuance. See cases cited in note to Stevenson v. Sherwood, 22 Ill. 238, 74 Am. Dec. 140, 143; and it may be stated as the general policy of the courts to grant a sufficient postponement or continuance to the adverse party, if desired, to enable him to secure the testimony needed to meet the new issue. To refuse this is ground for exception."

A determination of whether or not the discretion of the trial court has been abused in a given case must necessarily be ascertained from an examination of the particular facts involved in that case. See *Baker v. Jensen* (1931), 135 Or. 669, 295 P. 467. In light of the foregoing statement of the general rule with reference to the denial or grant of continuances, and the statement of the proper appellate attitude to be taken in a review of the trial court's discretion in granting or refusing such continuances, we may proceed to a determination of whether or not there has been an abuse of discretion in the instant case.

We will consider first the question of whether or not the amendment made in this case was a material or substantial one. Next, we will consider whether or not the amendment made operated to the surprise of the appellant. We will then discuss the effect to be given appellant's informal application for continuance, and in conclusion consider the question of prejudice and the portions of the record necessary to a determination of such prejudice.

MATERIALITY OF AMENDMENT.

No serious argument can be made that appellees' second amended complaint (T. R. pages 9-12) filed on the day set for trial did not present a material and substantial amendment to appellees' previous pleadings in the cause. That second amended complaint introduced as a completely new issue the question of

whether or not appellant had negligently flown appellees' aircraft resulting in its destruction. The original complaint (T. R. pages 3 and 4) set up a defective action on contract alleging a promise unsupported by consideration to pay the sum of $3,000.00 as the value of the aircraft after its destruction (paragraph 4 of complaint, T. R. 4). This complaint, having been dismissed on appellant's motion pointing out such defect to the trial court, appellees on the 19th day of March, 1951, filed an amended complaint (T. R. pages 6 to 8) which cured the defect of the prior pleading by inserting in paragraph 2 thereof a prior promise by appellant to pay the reasonable value of said aircraft if destroyed while in his possession.

No intimation is contained in either the original or first amended complaint that appellees intended to rely on any other theory of recovery than a contractual one. It was not until the day set for trial and after counsel for the respective parties had announced ready that appellees advised the court and appellant that they were also relying on a tort theory of recovery (T. R. 49).

As apparent as it would seem that the injection of a new and different theory of recovery in addition to issues previously drawn constitutes a material and substantial amendment, the trial court stated at T. R. 51 in resetting the trial for the next day:

> "Well, there is a slight difference in the pleading. It seems to me that it involved the same principles originally as it does now. So, I will reset it for hearing tomorrow—for trial tomorrow morning at ten o'clock."

The trial court was silent as to the reasons supporting its opinion that the issues previously drawn were substantially the same. If it were suggested that paragraphs 3 of the original complaint and the amended complaint should suggest to appellant that appellees were relying on the doctrine of *res ipsa loquitur* to prove negligence, it is sufficient answer that no evidence of negligence could be introduced under that paragraph. It is fundamental law that that doctrine is a rule of evidence and that it is necessary to expressly plead negligence if you wish to rely on that doctrine. Furthermore, under appellees' original and amended complaint an allegation of possession under bailment was essential to their contractual theory of recovery, and it is submitted that a defendant should be no more chargeable with the suggestions inherent in subtle imperfections in pleadings than a plaintiff should be chargeable with the obligation and responsibility of making his theories of recovery clear prior to trial. Also, in both the original and amended complaint, appellees prayed for interest which would indicate clearly that they thought they were suing in contract and not in tort. For the reason stated, we conclude that the trial court erred in its ruling on appellant's motion for continuance in so far as that ruling may be based on the trial court's opinion that appellees' second amended complaint did not operate as a material and substantial change of its prior pleadings in the cause.

SURPRISE.

The general rules governing absence of surprise as ground of refusing continuance are stated in 17 *C.J.S.*, section 73, pages 247, 248 as follows:

> "It is a well established rule that an application for a continuance based on an amendment of the adversary's pleadings is properly denied where it does not appear that the amendment operates as a surprise to applicant, or where it affirmatively appears that applicant had actual knowledge of the facts alleged in the amendment. There is no surprise constituting a ground for continuance where the subject matter of the amendment is, or has been treated by the parties as being, in issue, or where the matter claimed to cause surprise is proper defensive matter to a new issue brought into the case by applicant.
>
> Where the original pleadings are full enough to put the adverse party on notice, or to give him a reasonable premonition, as to the matter embraced in the amendment and the likelihood of its being raised on or before the trial, the amendment is no cause for a continuance on the ground of surprise. Thus, where evidence of the facts alleged in a trial amendment is admissible under the original pleading, a refusal of a continuance asked for on the ground of surprise is not error. Similarly the filing of an amendment is not matter of surprise warranting a continuance, where it merely sets forth in more detail the matters alleged in the original pleading; or states such matters in a different manner; or where the matter set up in the amended pleading is identical with that disclosed by the affidavit which accompanied the original declaration, or by the bill of

> particulars, or by answers to applicant's interrogatories. No continuance on the ground of surprise should be granted where the effect of the amendment is merely to put the case exactly where the opposite party claims it should be, as where the amendment is allowed to cure a defect which has been relied on by the opposite party to defeat the pleading, although the contrary has been held in the case of an amendment for the purpose of taking the case out of the statute of frauds."

Although the specific reason assigned by the trial court for denying appellant's motion for continuance was its opinion that the previous pleadings in the cause were sufficiently full to reasonably apprise appellant of the new issue and that he was therefore not injured (T. R. 55, 56), it is anticipated that appellees may argue that appellant was not in fact surprised by the amendment because of his statement made at page 49 of the transcript of record as follows:

> "Mr. Boggess: 'Mr. McNabb, I presume you're alleging negligence now, is that correct?' "

which statement was made prior to appellant's having seen the proposed second amended complaint. It is therefore thought necessary that the true meaning of surprise as employed by the courts in ruling on motions for continuance be clarified. "Surprise" ordinarily connotes the state of mind which results from an unexpected event or the occurrence of any event not anticipated. "Surprise", legally, is divorced to a great extent from its factual lay concept. The ad-

judicated cases considered always with close scrutiny of the facts upon which they are based show that the courts are primarily concerned with the determination of the question of whether or not a party is entitled to *rely* on surprise as the grounds for continuance.

True, the record discloses that appellant, confronted with the amendment of the complaint, then anticipated that it contained an additional count of negligence and perhaps, arguably, previously anticipated that a last minute amendment might be made. To hold, however, that such anticipation precluded a right to rely on surprise would operate to establish a rule which would be impossible of administration and which would penalize experienced counsel. It would be difficult to apply since what in fact may be anticipated by an attorney would turn upon such factors as his experience, intelligence and aptitude for his profession. It would operate as a penalty because experienced, educated and brilliant counsel are seldom surprised in the lay sense of that word. Are they then to be required to prepare their case beforehand for every trial amendment which their craft and experience cause them to anticipate? Considering the limited amount of time which each practictioner has to devote to the several cases in which he has been retained, such a rule would make a successful lawyer out of a dullard and a pauper out of a wise man.

Moreover, the cases which are cited in support of the categorical proposition that, absent surprise, a party is not entitled to a continuance where confronted with an amended pleading are not applicable

to the instant case. In cases where surprise in its factual sense has been employed as a reason or basis for denying a motion for continuance, the existence of such absence of surprise is apparent in the record before the court. For example, where the party moving for continuance has already testified to the matters which are made the basis for a supplemental pleading, that party is not entitled to a continuance. *George v. Wiseman* (1938), 98 F. (2d) 923 and *Donaldson v. Clark* (1942), 163 S.W. (2d) 226. Also, where the amendment is made at trial to conform the pleadings with proof of an alleged fact treated by the parties throughout the proceedings as being an issue then there is no abuse of discretion in denying a motion for continuance. *Roberts v. Kemp* (1928), 218 Ala. 350, 118 So. 656; *Louisville & N. R. Co. v. Tuggle* (1913), 151 Ky. 409, 152 S.W. 270.

It is also to be noted that in many instances where the courts speak in terms of absence of surprise as the grounds for denying a continuance, the real basis of their rulings is that the amendments are not material and that the evidence introducable under the amended pleading would have been introducable under the issues as previously drawn. For example, see *Union Indemnity Co. v. Webster* (1928), 218 Ala. 468, 118 So. 794; *Balm v. Nunn* (1884), 63 Iowa 641, 19 N.W. 810; *Central Truckaway System v. Harrrigan* (1949), 79 Ga. App. 117, 53 S.W. (2d) 186.

With reference to the absence of surprise as the grounds for denying continuance, the rule laid down by the Iowa court in *Sapp v. Aiken* (1886), 68 Iowa

699, 28 N.W. 24, is designed to obtain and promote justice. In that case it was held that an attorney need only prepare his case to meet the issues drawn by the pleadings.

FORM AND MANNER OF APPLICATION.

The question here presented is whether or not the trial court's ruling in the instant case upon an oral application for continuance supported only by the unsworn statement of counsel may be reviewed for abuse of discretion.

No territorial statute exists which requires that an application for continuance based on material amendment of an adversary's pleading be made in writing or supported by an affidavit or other proof. Such requirement does exist, however, where the grounds are absence of evidence (A.C.L.A. 1949, section 55-7-10) and non-return of a commission to take testimony (A.C.L.A., 1949, section 58-4-25). Nor do the uniform rules of the District Court for the District of Alaska, effective March 7, 1947, as amended, impose any requirement, mandatory or otherwise, that an application for continuance be in writing and supported by affidavit or other proof.

The instant case, it is submitted, falls under A.C.L.A. 1949, section 52-1-7 which provides in full as follows:

> "A court or judicial officer has power to adjourn any proceedings before it or him from time to time, as may be necessary, unless otherwise expressly provided by this code."

The power to grant a continuance or adjournment of proceedings under this provision of the code should be wisely and judiciously exercised and the refusal to exercise that power in a proper case should be subject to appellate review in the interests of justice.

But even were it held as a general rule of practice without reference to the absence of court rule or statute that applications for continuance must be in writing and supported by affidavit or other proof, such rule would have no application in the instant case.

No objection was made to the form or manner of appellant's application. Both court and counsel treated appellant's application as a motion in the case and permitted appellant to make an oral statement in support of that motion also without objection. Nor did the court choose to rely on any defect in the manner or form of the application in overruling it. The particular grounds stated by the court for rejection of appellant's motion were as follows:

> "I think the matter presented by the pleadings before the last amendment were such that the defendant was reasonably apprised of the whole situation and that he is not injured by this recent amendment." (T. R. 55, 56.)

and, inferentially, that such amendment was not material.

In *City of Wichita Falls v. Lipscomb* (1932), 50 S.W. (2d) 867, upon motion for rehearing, appearing at page 873 of the Reporter opinion, an order denying

an unverified motion for continuance was held subject to review for abuse of discretion even though a statute required verification of such motions where, as in the instant case, no objection was made to the form of the motion. *A fortiori,* the reason for such ruling should be applicable where no statute or rule of court dictates the form or requisites of an application for continuance.

Also in support of the proposition that an oral motion for continuance may be considered on the discretion involved in its denial, see *Flint v. Atlas Mut. Ins. Co.* (1907), 134 Iowa 531, 112 N.W. 1 in which case, upon trial amendment, an oral motion for continuance and oral statement of movant counsel in support thereof was taken down by the official reporter. Stated the Iowa court at page 2 of the opinion as its appears in the Northwestern Reporter:

> "The point now made by the appellee that the motion was not made in writing does not seem to have been made below. Moreover, a motion thus made in the midst of a trial and dictated in the record should, in our opinion, be considered as being in writing, especially where the trial court and parties have recognized it as a motion in the case."

Considering that the primary object sought in appellate review of rulings is the "promotion of substantial justice", it is also submitted that formal defects should not be relied on to sustain the ruling of a trial court which does not effect that end. Particularly should that be true where, as in the instant

case, a material amendment is made on the day set for trial. If equities were weighed between counsel, some tolerance in form should be extended toward counsel who states that he expended every reasonable effort to prepare for trial to meet an amendment which could have been made prior to trial date.

Expeditious handling of litigated matters, of course, is a commendable goal leading to public endorsement of and satisfaction with the American trial system and administration of justice. But, expedition should not be replaced by haste.

PREJUDICE AND ABUSE OF DISCRETION.

Did the trial court abuse its discretion to appellant's prejudice?

Appellant's motion for and statement in support of motion for three days' continuance appears at pages 52 to 54 of the transcript of record. Appellant's counsel pointed out to the trial court that he had diligently attempted to prepare for trial to meet appellees' second amended complaint and accounted for his time from the court's adjournment on the preceding day. Although counsel asked for but three days' continuance in order to organize his notes and work out a plan of procedure for the trial, his request was denied. Appellant particularly pointed out that the effect of "downdrafts or vertical air currents on an aircraft in flight" would be subsequently material to the cause. Although appellees offered to permit

a continuance after presentation of their case (T. R. 54) appellant advised the court that preparation of his case was important in cross-examination of appellees' witnesses (T. R. 55). He further advised the court that the responsibility of any continuance rested directly on appellees who had waited until the day of trial to amend their complaint.

The statement of appellant's counsel definitely reveals that he had been surprised and that he was less ready to go to trial than if appellees' amendment had not been made.

If appellant's statement was somewhat indefinite and short in detail, it is submitted that the case falls squarely within the rule stated in the case of *Dispatch Laundry Co. v. Employer's Liability Assur. Corp., Ltd.* (1908), 105 Minn. 384, 117 N.W. 506 at page 508 as follows:

> "* * * Therefore, when respondent attempted to introduce evidence of an issue not in the pleadings, by interrogating Mr. Norris, president of respondent company, as to the intelligence of the injured girl, appellant was entitled to object to that line of inquiry, and respondent was forced to amend its complaint. It did so by entirely eliminating the original ground of negligence upon which the settlement was made, and introducing a new issue. Under such circumstances appellant company could not be called upon to disclose what particular additional witnesses it would call, provided a continuance was granted, nor could it be required to disclose what such testimony would be. Appellant was not respon-

> sible for the condition which made an amendment to the complaint necessary. A suggestion by reputable counsel that the case had been prepared for trial upon the issues presented by the pleadings, and that he was not prepared to go on with the trial upon the new issues, was all that could reasonably be required under the circumstances presented by this record. In a case where there is such a radical change of issues by amendment to the complaint in the course of the trial, counsel for defendant could not, until investigation, be expected to specify what additional witnesses would be called to meet the new condition. While recognizing that the trial court was endowed with the power to exercise reasonable discretion, we believe that the amendment placed the defendant in a position which required a continuance of the case."

Certainly an important factor in determining whether or not the trial court's discretion has been abused is that of who is responsible for the necessity of such continuance and the time which the amending party has had since the commencement of the suit to determine what course is necessary and what amendments he should make. *State ex rel. Stanley v. American Surety Co. of New York* (1935), 80 S.W. (2d) 260.

The instant case was commenced on the 24th of January, 1951. A trial date of May 7, 1951 was set on the 13th of April, 1951 (T. R. 25), with counsel for both parties present. Prior to April 13, appellees had already amended their complaint without setting

up any cause of action on a theory of negligence. Although appellees had twenty-four days after the matter was set for trial and over three months from the time the action was commenced to advise the court and opposing counsel of their intention to rely, in the alternative, on a theory of recovery in tort, they waited until the day set for trial to give such notice.

Still another factor which should be weighed in determining whether the court has abused its discretion is the time elapsed between the filing of an amended pleading and the time set for trial. As stated in 17 C.J.S., sec. 72, p. 249:

> "The time elapsed between the amendment and the time the adverse party is required to proceed with the trial is one of the factors considered by the court in the exercise of its discretion as to the granting or refusal of continuances on the ground of surprise resulting from amendment of the pleadings."

Although the Federal Rules of Civil Procedure empower the trial court, in its discretion, to permit an amended pleading at any stage of the proceedings (Rule 15) such discretion is abused it is submitted where a substantial amendment is made on the day set for trial and the court does not allow the surprised opponent at least the ten day period to answer and prepare his defense ordinarily provided by the rule. Compare with *Wright v. Northern Pac. Ry. Co.* (1905), 38 Wash. 64, 80 P. 197, where statutory period of twenty days to answer complaint is treated

as the minimum period which should be extended on motion for continuance to defendant to answer and prepare to meet new issues tendered by material amendment of plaintiff's complaint.

In summary, the amendment was material, it caused surprise and resulted in appellant being unprepared to meet the issues tendered.

There remains to be considered the question of whether appellant was actually prejudiced by the amendment as permitted. It is submitted that prejudice should be presumed in the denial of a request for a continuance for a reasonable period of time where a material trial amendment is made and the movant is not prepared to proceed with the trial. No examination of the transcript of evidence, under such circumstances, would reveal whether or not there was such lack of preparation detrimental to movant. The appearance of the record would depend largely on the ability and past experience of individual counsel and could in no way be an accurate index of what such counsel could have done in representing his client if he had been extended adequate time to prepare. For that reason, appellant, in the instant case, did not designate for printing any part of the evidence adduced at the trial.

However, appellees did designate for inclusion the entire transcript of evidence. If this court deems it necessary to examine the whole record to determine whether or not the appellant was in fact prejudiced, the following information should be important. Evi-

dence reported at the trial covers 274 pages of the transcript of record, those pages being 58 to 352, inclusive. Of these 274 pages, 221 pages are devoted to the examination of appellees' witnesses. Of these 221 pages, only 48 pages are devoted to the issue of contract—those pages covering the testimony of Dean Phillips, one of the appellees, covered by pages 117 to 156 of the transcript, the testimony of Charles James Freericks appearing at pages 249 to 253 of the transcript, and Floyd James whose testimony appears at pages 157 to 162 of the transcript. All of the testimony of the remaining witnesses, consuming some 125 pages of the transcript of record on direct and redirect examination, was devoted to the issue of negligence, which issue was casually stated by appellees' counsel on the day set for trial as "just an allegation, your honor, on the alternative cause of action which was—is the subject of this action was in fact operated in a negligent manner" (T. R. 49). But for this "just an allegation" some 125 pages of direct testimony would have been inadmissible and it was to meet 125 pages of testimony that the court thought appellant needed no time in which to prepare.

Also the transcript of record reveals that appellant's suggestion to the court that "the effect of down drafts or vertical air currents on an aircraft in flight" would be subsequently material is verified (T. R. 53). Those factors and the related factors of wind and turbulence in mountainous areas consumed the greatest part of the testimony of appellees' expert witnesses Randall K. Acord, whose testimony appears at pages 211 to 248 of the transcript of record, and Hawley

N. Evans, at pages 320 to 332 of the transcript of record. It is further to be noted that a considerable portion of the testimony of Douglas Heay, the appellant, called by appellees to testify at the outset of the trial, covers such questions as his knowledge of air currents, winds and turbulence and the effect of those factors on an aircraft in flight and the particular meteorological conditions affecting the flight of the aircraft the day of the crash. The technical nature of the questions involved and the closeness of the question involved as apparent from the transcript of record leads one inevitably to the conclusion that appellant was entitled to his three days' continuance and to deny it to him was an abuse of discretion. It is even suggested by the record that the delayed pleading of appellees was a calculated surprise for the presentation of their case indicates that they were prepared on the question of negligence several days before trial. Equal courtesy should have been extended the appellant.

We wish to note that the rule governing second or further continuances should have no bearing in this case. Appellees' first motion was in effect denied by the trial court when it stated at page 51 of the transcript of record in effect that the amended pleadings involved the same principles as the original pleading. Certainly resetting the case for hearing the next day was not calculated to enable appellant to prepare his case.

In conclusion, whether the erroneous denial of a motion for continuance on the grounds of a material

amendment to the complaint is presumably prejudicial or whether it is necessary to determine from the whole record whether the applicant for record was in fact prejudiced, it is submitted that under either rule appellant is entitled to the grant of a new trial by this court and an opportunity to meet appellees' case on negligence fully prepared.

Dated, Fairbanks, Alaska,
January 21, 1952.

Respectfully submitted,
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Receipt of typewritten copy
of foregoing brief acknowledged
this 15th day of January, 1952.
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